No. 83-243

In the Supreme Court of the United States

OCTOBER TERM, 1983

BROWN & ROOT, INC., ET AL., PETITIONERS

v.

BILLY THORNTON AND JAMES H. BROUSSARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether land-based workers, injured during the construction of offshore drilling platforms, were "engaged in maritime employment" at the time of their injuries within the meaning of Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 902(3).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 707 F.2d 149. The opinions of the Benefits Review Board (Pet. App. A13-A22, A23-A29) are reported at 12 Ben. Rev. Bd. Serv. (MB) 883 and 13 Ben. Rev. Bd. Serv. (MB) 37. The decisions and orders of the administrative law judges (Pet. App. A30-A44, A45-A71) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 1983. The petition for a writ of certiorari was filed on August 15, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. 902(3), provides in pertinent part:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel * * *.

Section 3(a) of the LHWCA, 33 U.S.C. 903(a), provides in pertinent part:

> Compensation shall be payable under this [Act] in respect of disability or death of an employee but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). No compensation shall be payable in respect of the disability or death of—
>
> (1) A master or member of a crew of any vessel * * *.

STATEMENT

1. Respondent Billy Thornton was employed as a crane rigger for petitioner Brown & Root, Inc., at its Greens Bayou Fabrication Facility adjacent to the ship channel in Houston, Texas (Pet. App. A3, A14, A31-A32). This facility is used for the construction of stationary offshore drilling platforms and jackets (*ibid.*).[1] Once completed, the

[1] Jackets are the steel pipe structures that are immersed in offshore waters to support the platforms (Pet. App. A14 n.1).

platforms and jackets are loaded onto barges by Brown & Root riggers and are transported to offshore locations for permanent installation on the ocean floor (*id.* at A14, A31-A32). The loading of a platform onto a barge is called a "load-out" (*id.* at A3, A32). "Load-outs" occur seven to ten times a year and take from one day to a week to complete (*ibid.*).

Thornton's usual job as a crane rigger involved attaching the hook of a crane onto whatever materials had to be moved and set into place during construction of the platforms (Pet. App. A3, A14, A32). Thornton also participated in "load-outs" (*ibid.*). On the day of the injury, Thornton was one of six men assigned to move timbers, crossties and rebar[2] from the D-yard of the Greens Bayou facility, directly adjacent to the ship channel, to the C-yard, approximately one quarter mile away (*id.* at A4, A14, A32). Thornton was in the process of dumping crossties from the back of a truck in the C-yard when he fell from the truck and injured his leg (*ibid.*).

Thornton filed a claim for benefits under the LHWCA. The administrative law judge ("ALJ") denied Thornton's claim, finding that he did not satisfy the jurisdictional prerequisites for coverage under Sections 2(3) and 3(a) of the Act (33 U.S.C. 902(3) and 903(a)) (Pet. App. A33-A39). The ALJ held (Pet. App. A34, A36) that Thornton did not satisfy the "status" requirement of Section 2(3) of the Act because his primary occupation — that of a "fixed platform builder" — did not bear "a realistically significant relationship to traditional maritime activity * * * [or] commerce."[3]

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[2]Rebar is structural steel that is used to reinforce poured concrete (Pet. App. A4 n.3, A32).

[3]The ALJ additionally found that Thornton was not a longshoreman within the meaning of Section 2(3), reasoning that "his occasional load-out activities cannot give him the status of a longshoreman or person engaged in longshoring operations" (Pet. App. A36).

The ALJ also held that Thornton did not satisfy the "situs" requirement of Section 3(a) because the Greens Bayou facility was not a "maritime enterprise" (Pet. App. A34, A38).

Thornton appealed the decision and order of the ALJ to the Benefits Review Board, pursuant to 33 U.S.C. 921(b)(3). The Board, in a divided vote, affirmed the ALJ on the "status" issue and therefore did not reach the "situs" question (Pet. App. A13-A17).[4]

2. Respondent James H. Broussard was employed as a fabrication fitter for petitioner Waukesha-Pearce Industries, Inc., at its construction yard adjacent to navigable waters at the Port of New Iberia, Louisiana (Pet. App. A4, A24, A47). This facility is used for the construction of the living quarters, heliports and generators used on stationary offshore drilling platforms. These components are completed on land and then hoisted onto barges by a subcontractor for transport to offshore locations where they are permanently affixed to the ocean floor (*id.* at A4-A5, A24, A47-A48, A54-A57). Waukesha-Pearce performs "load-outs" 10 to 12 times a year, and each "load-out" takes from one to seven days to complete (*id.* at A58).

Broussard's usual duties as a fabrication fitter included reading blueprints and constructing platform components from structural steel beams (Pet. App. A25, A54-A55). Broussard also participated in "load-outs" and "recalled that on two occasions he 'rode on the barge while the

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[4]Dissenting Board Member Miller believed that Thornton satisfied both jurisdictional tests (Pet. App. A17-A22). Miller stated that platforms were within the definition of cargo, and he argued that this Court, in *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 82-84 (1979), and *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 273 (1977), had concluded that workers who spent at least part of their time moving cargo between ship and land were engaged in maritime employment (Pet. App. A18-A19).

tugboat pulled the barge back and turned it around so it could be brought back so that smaller buildings could be loaded on' " (*id.* at A24, A48-A49, A59). Broussard injured his back on land, while moving a wooden block out of the path of a lift machine, which was being used to construct a heliport (*id.* at A5, A25, A48).

Broussard applied for benefits under the LHWCA. The ALJ denied Broussard's claim, finding that he, like Thornton, did not meet either of the jurisdictional prerequisites for coverage under the Act (Pet. App. A60-A71). Broussard appealed the decision and order to the Board, which, in a divided vote, affirmed the ALJ on the status issue and therefore did not reach the situs question (*id.* at A25-A28).[5]

3. Respondents Thornton and Broussard sought review of the Board's decisions in the court of appeals, pursuant to 33 U.S.C. 921(c).[6] Because it found that both workers met the "status" test under Section 2(3) of the LHWCA, the court of appeals reversed the Benefits Review Board and remanded each case for reconsideration of whether Thornton and Broussard were injured on a covered situs under Section 3(a) of the Act (Pet. App. A5-A11).

In reaching its decision on the status question, the court below explained that LHWCA coverage turns on whether an employee is "engaged in maritime employment" (Pet. App. A7; 33 U.S.C. 902(3)). The court recognized, however, that "maritime employment" is not limited to the occupations specifically listed in Section 2(3) (Pet. App. A7). See, *e.g., Miller* v. *Central Dispatch, Inc.*, 673 F.2d 773 (5th Cir.

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[5]Board Member Miller dissented for the reasons stated in his *Thornton* opinion (Pet. App. A28-A29).

[6]The Director, Office of Workers' Compensation Programs, United States Department of Labor, appeared as a party respondent in the court of appeals and filed a brief in support of Thornton and Broussard (Pet. App. A11-A12).

1982). For workers injured on land, therefore, " '[t]he relevant inquiry in determining whether an employee was engaged in maritime employment is whether his activities had a 'realistically significant relationship to traditional maritime activity' " (Pet. App. A7, quoting *Pippen* v. *Shell Oil Co.*, 661 F.2d 378, 382 (5th Cir. 1981)). The court noted that offshore drilling is regarded as maritime commerce (*Pippen* v. *Shell Oil Co.*, 661 F.2d at 384) and concluded that "[a] worker whose job directly facilitates that process is engaged in employment which has a substantial relationship to maritime commerce" (Pet. App. A9). The court accordingly found that Thornton and Broussard met the status test of Section 2(3). "Thornton's job was helping to construct the platforms themselves, while Broussard's was helping to build the living quarters and heliports indispensable to the successful functioning of the fixed production platforms" (Pet. App. A10). Because the Benefits Review Board did not address the further jurisdictional requirement of Section 3(a) of the Act, 33 U.S.C. 903(a), the court remanded each case for reconsideration of the situs question.

ARGUMENT

1. This case is not ripe for review by this Court. The Court has repeatedly observed that both the status and situs tests of Sections 2(3) and 3(a) of the LHWCA must be satisfied before an employee will fall within the coverage of the amended Act. *Director, OWCP* v. *Perini North River Associates*, No. 81-897 (Jan. 11, 1983), slip op. 16-17; *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 73 (1979); *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 264-265 (1977). The court of appeals has merely determined that Thornton and Broussard meet the status test of Section 2(3); the Section 3(a) situs question was remanded to the Board. Therefore, there has been no final determination that either employee is entitled to benefits under the Act, and there is no reason for this Court to depart from its usual

practice of declining to review nonfinal orders of the courts of appeals.[7] *Goldstein* v. *Cox*, 396 U.S. 471, 478 (1970) ("this Court above all others must limit its review of interlocutory orders"). See also *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967); *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916); *American Construction Co.* v. *Jacksonville Ry.*, 148 U.S. 372, 384 (1893).

2. In any event, review is unwarranted because the court of appeals correctly determined that Thornton and Broussard satisfied the Section 2(3) status test for coverage (33 U.S.C. 902(3)), and the decision below does not conflict with any decision of this Court or of any other court of appeals.

a. As the court of appeals correctly stated (Pet. App. A7), the basic test for determining whether a worker is an employee under Section 2(3) of the LHWCA is whether he is "engaged in maritime employment." The test uniformly employed by the courts of appeals in making that determination for land-based workers is whether an employee's activities have a "realistically significant relationship to traditional maritime activity" (Pet. App. A7-A9). See, *e.g.*, *Boudreaux* v. *American Workover, Inc.*, 680 F.2d 1034, 1052 (5th Cir. 1982) (en banc), cert. denied, No. 82-605 (Jan. 24, 1983); *Fusco* v. *Perini North River Associates*, 622 F.2d 1111, 1113 (2d Cir. 1980), cert. denied, 449 U.S. 1131 (1981);

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[7]If, on remand, it is ultimately determined that the situs requirement is not met, petitioners will have no occasion to seek review in this Court. If, on the other hand, the Board determines that the Act's situs requirement is met, petitioners may contest that finding in the court of appeals. Should the court of appeals agree with the Board and otherwise hold the claimants entitled to benefits, petitioners will then be able to file a petition for a writ of certiorari raising the status issue they now seek to present, as well as any other issues decided adversely to them by the court of appeals.

Odom Construction Co. v. *Department of Labor*, 622 F.2d 110, 113 (5th Cir. 1980), cert. denied, 450 U.S. 966 (1981); *Weyerhauser Co.* v. *Gilmore*, 528 F.2d 957, 961 (9th Cir. 1975), cert. denied, 429 U.S. 868 (1976)). This test accords with this Court's conclusion that "maritime employment" is not limited to the occupations specifically enumerated in Section 2(3). *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. at 77-78 n.7.[8]

The court of appeals' application of the "realistically significant relationship" test in this case is undoubtedly correct. As the court of appeals explained, " '[o]ffshore drilling — the discovery, recovery, and sale of oil and natural gas from the sea bottom — is maritime commerce.' A worker whose job directly facilitates that process is engaged in employment which has a substantial relationship to maritime commerce" (Pet. App. A9; citation omitted). See *Herb's Welding* v. *Gray*, 703 F.2d 176, 180 (5th Cir. 1983); *Boudreaux* v. *American Workover, Inc.*, 680 F.2d at 1052-1053, aff'g 664 F.2d 463, 464-466 (5th Cir. 1981); *Pippen* v. *Shell Oil Co.*, 661 F.2d at 384.[9] Because

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[8]In *Director, OWCP* v. *Perini North River Associates*, No. 81-897 (Jan. 11, 1983), slip op. 19-21 & n.27, this Court rejected application of the "significant" or "direct" relationship test to employees injured on navigable waters because, in establishing the separate "situs" and "status" tests in the 1972 amendments to the LHWCA, Congress did not intend to withdraw coverage from employees "traditionally covered by the Act, who were injured in the course of their employment on navigable waters as previously defined." The Court did not discuss whether the test properly applied to workers injured on land (*id.* at 21 n.27).

[9]As the court of appeals explained in *Boudreaux*, 664 F.2d at 466 (footnote omitted):

> [t]he production of oil and natural gas from the beds of navigable bodies of water and the ocean bottom has become a maritime activity. This is a major industry with peculiar maritime-related problems. Employment in an industry that provides approximately 40,000 jobs, and untold millions of dollars in revenues and that takes place primarily upon the navigable waters of the United States, bears "a significant relationship to • • • commerce on navigable waters."

the construction of fixed platforms and their component parts is essential to the effectuation of the offshore drilling process, it follows, as the court of appeals correctly noted, that such activity is significantly related to traditional maritime activity.[10]

b. Although the court of appeals did not address the issue, claimants Thornton and Broussard are covered employees under Section 2(3) of the LHWCA for the additional reason that each participated in longshoring operations (Pet. App. A13, A14, A24, A32, A48-A49, A59). In *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. at 82-83, this Court stated that

> the crucial factor [in determining whether a worker is engaged in maritime employment] is the nature of the activity to which a worker may be assigned. Persons moving cargo directly from ship to land transportation are engaged in maritime employment. * * * A worker responsible for some portion of that activity is as much an integral part of the process of loading or unloading a ship as a person who participates in the entire process.

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[10]Petitioners erroneously contend (Pet. 18) that the " 'realistically significant relationship' " test employed by the court below differs from the test employed by the Second and Ninth Circuits. Each of those courts of appeals has stated this test in terms nearly identical to the words used by the Fifth Circuit. See, *e.g.*, *Fusco* v. *Perini North River Associates*, 622 F.2d at 1113 (" 'a realistically significant relationship to traditional maritime activity *involving navigation and commerce on navigable waters*' ") (Pet. 18; emphasis in original), *Weyerhauser Co.* v. *Gilmore*, 528 F.2d at 961 (a "significant relationship to * * * *navigation [or to] commerce on navigable waters*' ") (emphasis added). No importance can be attached to the fact that the Fifth Circuit in this case used a short-hand version of the test that did not include the italicized phrases, because the court of appeals expressly concluded that offshore drilling operations are maritime commerce (Pet. App. A9-A10).

As part of their regular duties, Thornton and Broussard participated in "load-out" operations, during which completed platforms were loaded aboard barges at their employers' waterfront fabrication yards for transport to permanent offshore drilling sites (Pet. App. A3, A14, A24, A32, A48-A49, A59). The "load-out" aspect of Thornton's and Broussard's employment is sufficient in itself to bring the claimants within the occupational coverage of Section 2(3). Cf. *Gilliam* v. *Wiley N. Jackson Co.*, 659 F.2d 54 (5th Cir. 1982), cert. denied, No. 81-1039 (Jan. 24, 1983) (construction site foreman injured while supervising the unloading of pilings from barge onto shore was engaged in maritime employment).[11]

3. Petitioners argue (Pet. 9-11) that Broussard and Thornton cannot be within the Act's intended coverage because, "during the legislative process which culminated in the creation of the 'status' and 'situs' tests," Congress rejected the inclusion of "offshore oil workers" within the coverage of the Act. See proposed "Marine Petroleum

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[11] As noted by the court below (Pet. App. A10 n.9), this result is not changed by the fact that the claimants did not spend a substantial portion of their time in loading operations. *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 273 (1977) ("when Congress said it wanted to cover 'longshoremen,' it had in mind persons whose employment is such that they spend at least some of their time in indisputably longshoring operations"). Accord, *Schwabenland* v. *Sanger Boats*, 683 F.2d 309, 312 (9th Cir. 1982), cert. denied, No. 82-523 (Jan. 24, 1983); *Graziano* v. *General Dynamics Corp.*, 663 F.2d 340, 343 (1st Cir. 1981); *Boudloche* v. *Howard Trucking Co.*, 632 F.2d 1346, 1348 (5th Cir. 1980), cert. denied, 452 U.S. 915 (1981). Nor is the result altered by the fact that neither of the claimants was engaged in "load-out" activities at the time he was injured. See, *e.g.*, *Browning* v. *B.F. Diamond Construction Co.*, 676 F.2d 547, 548-549 (11th Cir. 1982), cert. denied, No. 82-4 (Jan. 24, 1983); *Hullinghorst Industries, Inc.* v. *Carroll*, 650 F.2d 750, 754 (5th Cir. 1981), cert. denied, 454 U.S. 1163 (1982); *Brady-Hamilton Stevedore Co.* v. *Herron*, 568 F.2d 137, 140 (9th Cir. 1978); *Stockman* v. *John T. Clark & Son, Inc.*, 539 F.2d 264, 274 (1st Cir. 1976), cert. denied, 433 U.S. 908 (1977).

Workers' Compensation Act," S.1547, 92d Cong., 1st Sess. (1971) (the Tower bill), *reprinted in Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972: Hearings on S. 2318, S. 525 and S. 1547 Before the Senate Subcomm. on Labor and Public Welfare,* 92d Cong., 2d Sess. 24-27 (1972). Because Broussard and Thornton are not themselves offshore oil workers, this argument is apparently raised to undermine the court of appeals' conclusion that the offshore drilling process is maritime commerce.

The Fifth Circuit, sitting en banc in *Boudreaux* v. *American Workover, Inc.*, 680 F.2d at 1053, has properly rejected petitioners' argument. As the *Boudreaux* court explained, the Tower bill would have extended LHWCA coverage to *all* marine petroleum extraction workers. As a result, crew members on movable oil barges, who would otherwise have been entitled to pursue compensatory damages under the Jones Act, 46 U.S.C. 688, would have been relegated to compensation remedies under the LHWCA. Moreover, at the time the Tower bill was proposed, both industry and labor agreed that other marine petroleum workers, such as those injured on navigable waters or on fixed platforms on the Outer Continental Shelf, were covered by the LHWCA. Accordingly, the only possible inference to be derived from the rejection of the Tower bill (680 F.2d at 1053)

> is that Congress felt that no new legislation was required to afford LHWCA coverage to non-crew oil-workers injured on navigable waters, and that it did not wish to deprive "crew" oil-workers of their more lucrative Jones Act recovery.

Indeed, were there any question concerning Congress' clear intent to provide offshore oil workers with LHWCA coverage, it is resolved by the fact that, in the Outer Continental Shelf Lands Act ("OCSLA"), Congress expressly extended LHWCA coverage to injuries occurring on the

Outer Continental Shelf. 43 U.S.C. (Supp. V) 1333(b). In sum, congressional action with respect to offshore oil workers is consistent with the court of appeals' conclusion that the oil drilling process is maritime commerce. And, given that conclusion, the court of appeals properly determined that because Broussard's and Thornton's duties have a significant relationship to such activity, they are covered by the Act.

4. Petitioners next contend (Pet. 11-13) that the court of appeals' conclusion that offshore oil drilling is maritime commerce conflicts with this Court's holdings in *Rodrigue* v. *Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), and *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971). In *Rodrigue* and *Chevron*, this Court held that, for admiralty law purposes, fixed platforms on the Outer Continental Shelf are to be treated as islands or as federal enclaves within a landlocked state, not as vessels. See 43 U.S.C. (Supp. V) 1333(a)(1). What petitioners fail to recognize is that *Rodrigue* and *Chevron* do not address the application of the LHWCA to injuries on the Outer Continental Shelf.[12] The decisions, therefore, are inapposite to this case.[13]

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[12]In *Rodrigue*, this Court was asked to determine whether a wrongful death action arising out of an injury on an oil drilling platform on the Outer Continental Shelf was governed by Louisiana law or the federal Death on the High Seas Act. This Court concluded that, under the OCSLA, Louisiana law governed. See 43 U.S.C. (Supp. V) 1333(a)(2). In *Chevron*, this Court similarly determined that the Louisiana statute of limitations, as opposed to the admiralty doctrine of laches, governed an injury on an oil drilling platform on the Outer Continental Shelf under 43 U.S.C. (Supp. V) 1333(a)(2).

[13]The two Fifth Circuit cases cited by petitioners (Pet. 12-13) as being in accordance with *Rodrigue* and, therefore, in conflict with the decision below (*In re Dearborn Marine Service, Inc.*, 499 F.2d 263 (1974), cert. dismissed, 423 U.S. 886 (1975); *Terry* v. *Raymond Int'l, Inc.*, 658 F.2d 398 (1981), cert. denied, 456 U.S. 928 (1982)), are also admiralty jurisdiction cases that, like *Rodrigue*, do not apply to the LHWCA context.

Rodrigue and *Chevron* were decided on the basis of principles that govern admiralty tort jurisdiction and that strictly require injury on the water. The amended LHWCA, which expressly applies to injuries on the Outer Continental Shelf (43 U.S.C. (Supp. V) 1333(b)), no longer requires that the injury occur on actual navigable waters, but, rather, contains distinct situs and status requirements of its own. See, *e.g. Dravo Corp.* v. *Maxin*, 545 F.2d 374 (3d Cir. 1976), cert. denied, 433 U.S. 908 (1977) (Congress may constitutionally extend coverage of LHWCA to land-based workers in shipbuilding industry). Accordingly, this Court's conclusion in *Rodrigue* and *Chevron* that fixed offshore platforms are extensions of land does not aid petitioners: although piers, wharves and shipyards are extensions of land, they nevertheless clearly meet the situs requirement of Section 3(a) and are instrumentalities of maritime commerce. Therefore, the construction of fixed offshore platforms should be regarded as "maritime employment" under Section 2(3) of the LHWCA, in the same manner as is the construction and repair of such landside facilities as piers and wharves.[14]

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[14]See *Hullinghorst Industries, Inc.* v. *Carroll*, 650 F.2d 750 (5th Cir. 1981), cert. denied, 454 U.S. 1163, (1982) (pier repair); *Trotti & Thompson* v. *Crawford*, 631 F.2d 1214 (5th Cir. 1980) (pier construction); *Odom Construction Co.* v. *Department of Labor, supra* (maintenance of mooring blocks); *Graziano* v. *General Dynamics Corp.*, 663 F.2d 340 (1st Cir. 1981) (maintenance of shipyard buildings and machinery); *Prolerized New England Co.* v. *Benefits Review Board*, 637 F.2d 30 (1st Cir. 1980), cert. denied, 452 U.S. 938 (1981) (maintenance of scrap-metal-cargo processing machinery); *Price* v. *Norfolk & Western Ry.*, 618 F.2d 1059 (4th Cir. 1980) (maintenance of shoreside shiploading machinery); *Newport News Shipbuilding & Dry Dock Co.* v. *Graham*, 573 F.2d 167 (4th Cir.), cert. denied, 439 U.S. 979 (1978) (maintenance of shipyard machinery); *Garvey Grain Co.* v. *Director, OWCP*, 639 F.2d 366 (7th Cir. 1981) (maintenance of grain-cargo processing and loading machinery).

5. Finally, petitioners suggest that the court of appeals' decision is an unwarranted extension of other decisions of the Fifth Circuit (Pet. 13-16). However, the court of appeals' conclusion that platform construction work satisfies the maritime employment test of Section 2(3) is fully in line with its prior holdings that marine oilfield specialty workers injured while aboard movable drilling rigs on navigable waters (*Boudreaux* v. *American Workover, Inc., supra; Pippen* v. *Shell Oil Co., supra*) and while aboard immovable drilling platforms on navigable waters (*Herb's Welding* v. *Gray, supra*) are covered employees under Section 2(3). Although in both *Boudreaux* and *Pippen* the workers sustained their injuries while over navigable waters, the Fifth Circuit made clear in *Boudreaux*, 680 F.2d at 1052-1053, that it would have reached the same determination of status in those cases had it applied the "realistically significant relationship" test alone.[15]

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[15] In any event, a conflict between different panels of the same court is not ordinarily grounds for granting a petition for a writ of certiorari. See *Davis* v. *United States*, 417 U.S. 333, 340 (1974); *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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